IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:19-cr-083-M-1
	)	Chief Judge Barbara M. G. Lynn
RUEL M. HAMILTON	)	

MR. HAMILTON'S MOTION TO PRECLUDE HEARSAY STATEMENTS ATTRIBUTED TO THE NOW-DECEASED CAROLYN DAVIS AND TO DISMISS FOR A LACK OF EVIDENCE

Abbe David Lowell, Bar No. 358651DC
Christopher D. Man, Bar No. 453553DC
Kaitlin A. Pierce, Bar No. 242020DC
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
ADLowell@winston.com
202-282-5000 (ph)
202-282-5100 (fax)

Dion J. Robbins, Bar No. 488888GA
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201
DRobbins@winston.com
214-453-6100 (ph)
214-453-6400 (fax)

Counsel for Defendant Ruel M. Hamilton

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

INTRODUCTION

Count 1 of the Indictment charges Mr. Hamilton with bribing Carolyn Davis, but there is no direct evidence of any improper *quid pro quo* between Mr. Hamilton and Davis. The evidence will show only that Davis asked Mr. Hamilton to help pay for Dallas school children to participate in Freedom Ride tours to retrace the steps of civil rights leaders in the 1960s Freedom Rides, and that Mr. Hamilton agreed to fund the trip by writing checks to a 501(c)(3) organization known as Hip Hop Government. The government will argue that Davis, with the help of Hip Hop Government's corrupt founder Jeremy Scroggins, stole money from the charity, and the government will argue that Mr. Hamilton's payments to Hip Hop Government were intended as bribes to enrich Ms. Davis. The government also will argue that Mr. Hamilton offered Ms. Davis future employment as a bribe. But the government is lacking any evidence of an illicit *quid pro quo* and, without that, all the government can prove is that Mr. Hamilton made lawful (indeed, noble) charitable contributions and that he made a legitimate job offer to Ms. Davis, someone he knew well for a long time and who had a lot of political and community experience, for her to do legitimate work.

The government apparently hoped to fill that void in its case through Davis' testimony, but that is no longer possible (if it ever was). Although Davis had pled guilty to soliciting bribes from Mr. Hamilton, Davis subsequently died and, therefore, cannot testify. Before she died, Davis also had told at least four people that she was intimidated to plead guilty, she intended to change her plea to not guilty and, if called to testify, she would testify that Mr. Hamilton had not bribed her or done anything wrong. (*See* Speedy Trial Act Mot. To Dismiss at 19-21 & Exs. A-C.) As best the defense can tell from the discovery produced to date, Davis never told the government or anyone else that Mr. Hamilton had bribed her, but out-of-court statements by or attributed to her

should be precluded as inadmissible hearsay and barred by the Confrontation Clause.

It is far from clear how the government plans to proceed in this case. With Davis' death, the government has various audio recordings (some from five years ago), *none* of which capture the alleged corrupt agreement for a bribe the government alleges to have occurred. This differs markedly from the audio recordings with Davis and others (including a government agent) where there is an explicit offer and acceptance of a thing of value for official action. Presumably, the government intended to call Davis as a witness to offer some proof of the required *quid pro quo* or at the least to connect some dots for the government to make its case. When that occurred, Mr. Hamilton could have cross-examined her (or called her as a witness himself) to show that there was no corrupt agreement, no *quid pro quo*, and no crime. Neither can happen now. The bare audio recordings cannot be cross-examined and the government will likely seek to play some of them, point to payments to the non-profit and the ultimate employment of Davis, and then ask the Court to allow them to argue all of this as circumstantial evidence of bribery. Such a presentation would be woefully inadequate and far from what a reasonable jury could find beyond reasonable doubt as to an illicit *quid pro quo*.

Based on the discovery provided, it also appears the government's case against Mr. Hamilton will include having Scroggins testify in some fashion. As Scroggins has confirmed in his interviews with the government that he *never* met or spoke with Mr. Hamilton, it is hard to see how he can be a substitute for Davis' testimony. Any testimony he would give would have to be based on something he was told by Davis. As such, that testimony would be inadmissible hearsay. Scroggins – a twice- convicted felon who has admitted to stealing from a charitable organization (a serious offense) – was offered a sweetheart deal where he only had to plead to misprision of a felony (a statutory maximum sentence of 3 years). The felony that Scroggins pled guilty to

knowing about, but not reporting, was the alleged bribery of Davis by Mr. Hamilton in which Davis conveniently received all of the money from the charity that Scroggins admits that he stole. But Scroggins freely admits that he has never met or spoken with Mr. Hamilton, so – to obtain his sweetheart deal – Scroggins must claim that the source of this knowledge came from something other than he heard or said himself, in other words what he will say that Davis told him. Even assuming that a twice-convicted felon would not fabricate a story in exchange for being allowed to testify to a far less serious charge than stealing from a charity, Scroggins should not be allowed to testify about inadmissible hearsay that has gone untested by the Confrontation Clause.

FACTUAL BACKGROUND

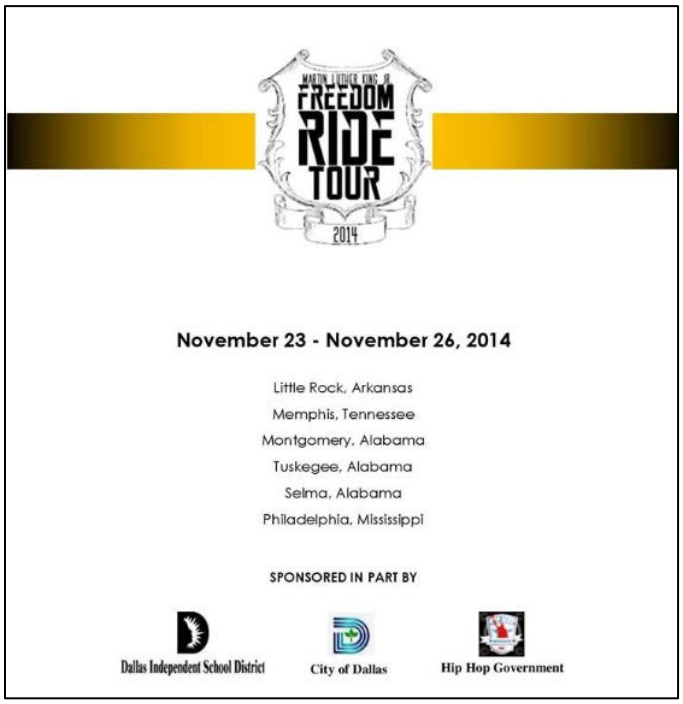
Mr. Hamilton has long been active in the Dallas political community. For years, Mr. Hamilton has worked with local leaders to improve the city, provided opportunities for residents – especially underrepresented minorities – through philanthropy, investment in minority communities, and promoting progressive public policies, civil rights, and political candidates.

Beginning around 2013, Davis, then a member of the Dallas City Council, began to develop plans with Dr. Jerry Chambers and other community leaders for a Martin Luther King Jr. Freedom Ride. The organizers envisioned a program that would commemorate the 1960s freedom rides by sending Dallas school children on a multi-state journey through the American south to visit important sites from the civil rights movement.

To make the Freedom Ride a reality, Davis sought and received funding from a number of sponsors, including the City of Dallas, the Dallas Independent School District, the local NAACP, and Mr. Hamilton. Mr. Hamilton was a natural choice to help sponsor the Freedom Ride given his strong reputation for philanthropy in the community and concern for civil rights. Davis was quite clear with the government that she solicited this money from Hamilton *for the Freedom Rides* – with no indication to Mr. Hamilton that the money would be going to her or used for any non-

charitable purpose. (12/31/18 FBI 302 at 1-2, 4-5; *see* 12/20/18 FBI 302 at 2 (Davis explaining that Hamilton did not know that she received cash from one of the checks).) Davis also told the FBI that she had a legitimate job working for Mr. Hamilton after she left the City Council and that she did real work. (2/13/19 FBI 302 at 1-2; 12/20/18 FBI 302 at 7 (same, noting that the job was offered while she was still on the City Council but no salary was discussed until later).)

When Mr. Hamilton agreed to be a leading sponsor of the program, Davis requested that funds be sent to Hip Hop Government, a 501(c)(3) nonprofit organization founded in 2005 by Scroggins. Hip Hop Government was presented as a legitimate charity that organizers were using to raise money for the Freedom Ride from the public. *See* Jerry B. Chambers, *Freedom Riders Tour*, The Dallas Post Tribune (Aug. 6, 2014), *available at:* http://dallasposttrib.com/freedom-riders-tour/. Indeed, organizers listed Hip Hop Government as a key sponsor of the 2014 Freedom Ride Tour, along with the City of Dallas and Dallas Independent School District.



Source: Martin Luther King Jr. Community Center (Facebook)

The first Freedom Ride left in fall 2013, taking 30 Dallas students and 15 chaperones on a

three-state tour. Given his involvement in the program, Mr. Hamilton actually was present to send the students off when they left Dallas. Davis introduced Mr. Hamilton to the students as one of the leading funders of the trip. Following the success of the first Freedom Ride, organizers expanded the program in 2014, sending ten students to Washington, DC to meet with civil rights icons and 60 students on a second bus tour.

As part of Scroggins' plea agreement, Scroggins claims that Davis would give him Mr. Hamilton's checks for Hip Hop Government, that he would deposit those checks, and give Davis the cash, essentially stealing that money from the charity. (Dkt. 58.) In other words, Scroggins admits to having stolen money from a charity, but he minimizes his conduct by claiming that Davis took all of the money – a convenient story now that Davis is no longer alive to contradict him. Scroggins claims that he was "aware" that Mr. Hamilton's checks for Hip Hop Government were intended to be diverted to Davis as bribes, and that Scroggins facilitated this bribery. *Id.* But Scroggins awareness of this so-called crime could not rest on any first-hand knowledge. Scroggins told the FBI that he did "not believe he [had] ever met HAMILTON, [or had] any telephone conversations with him," he was "not present when DAVIS got money from HAMILTON" and he "never observed HAMILTON paying DAVIS money." (10/16/18 FBI 302 at 4-5; *see also* C. Davis12/31/18 FBI 302 at 5 ("SCROGGINS never communicated with HAMILTON.").)

Any source for Scroggins awareness of a bribery scheme between Mr. Hamilton and Davis would seemingly have to come from Scroggins saying that he received the information from Davis as inadmissible hearsay. And with Davis dead, she becomes a convenient scapegoat for him. The money is gone from the charity he ran and he cashed the checks, but he can say Davis took the money. Stealing from a charity is a serious crime, particularly for a twice-convicted felon like Scroggins, and he can get a reduced sentence through a plea agreement if he can now "remember"

Davis saying something incriminating Mr. Hamilton in a bribery scheme. While this may make for a convenient story for Scroggins, his testimony about what he learned through the hearsay statements that he will attribute to Davis is not evidence. It is still unconfronted hearsay.

Nor is it a story that Scroggins can credibly attest is true. Scroggins would not believe the hearsay that he claims to have been told by Davis because Scroggins claims that he did not find Davis very credible. (10/23/18 FBI 302 at 4 ("SCROGGINS described DAVIS as an eccentric person who says a lot of reckless things."); *id*. at 4-5(claiming Davis had a "a gambling addiction" and would borrow money from him all the time that she would never repay).) Moreover, it is unclear why Scroggins would characterize the relationship between Davis and Mr. Hamilton as corrupt, when it seemed pretty common to him. (*Id.* at 4 ("DAVIS asked for money from people all the time, especially those she is closest to. . . . HAMILTON gives money to everybody and has been giving money for a long time."); *id*. at 6 (describing Davis as "mostly truthful, but not all the time").) Scroggins own concern with the veracity of things he claims to have heard further demonstrate why we have hearsay and confrontation rules in the first place – to exclude unreliable evidence.

ARGUMENT

I. STATEMENTS BY CAROLYN DAVIS ARE INADMISSIBLE

It remains unclear how the government would attempt to prove that Mr. Hamilton engaged in *quid pro quo* bribery or how he would know that Scroggins, and perhaps Davis, had stolen money that Mr. Hamilton had donated to charity. But it is clear that the Confrontation Clause and hearsay rules would preclude any effort by the government to use any statement by Davis that would incriminate Mr. Hamilton, as Davis is not alive to testify and be subject to cross-examination.

There is no context in which the Supreme Court has been more protective of a defendant's

Confrontation Clause rights than here, where the government may seek to use one defendant's confession against another defendant. The fact that at least four witnesses are prepared to testify that Davis recanted her guilty plea before she died and was prepared to testify that Mr. Hamilton is not guilty further highlights the wisdom and need for a vigilant Confrontation Clause. (*See* STA Mot. To Dismiss Exs. A-C.)

"The Confrontation Clause of the Sixth Amendment . . . guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.' The right of confrontation includes the right to cross-examine witnesses. Therefore, . . .the pretrial confession of one [defendant] cannot be admitted against the other unless the confessing defendant takes the stand." *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987). Accordingly, it has long been settled that one defendant's plea of guilty cannot be entered as evidence against another defendant absent an opportunity to confront the confessing defendant. *See, e.g.*, *Melendez-Diaz v Massachusetts*, 557 U.S. 305, 314 (2009) (tracing the case law back to *Kirby v. United States*, 174 U.S. 47, 53-55 (1899), and *King v. Turner*, 168 Eng. Rep. 1298 (1832)). It is equally clear "that the Confrontation Clause forbids the prosecution to introduce a nontestifying codefendant's confession implicating the defendant in the crime." *Greene v. Fisher*, 565 U.S. 34, 42-43 (2011) (citing *Bruton v. United States*, 391 U.S. 123 (1968)). Even in a joint trial where one defendant has confessed and the government is justified in introducing the confession against that defendant – which is not the case here – the Supreme Court has held that a limiting instruction for the jury to only consider the confession against the confessing defendant is constitutionally inadequate if the confession implicates other defendants, even if the names of those defendants are redacted. *Gray v. Maryland*, 523 U.S. 185, 192 (1998).

The Confrontation Clause quite plainly applies to "formalized testimonial materials, such

as affidavits, depositions, prior testimony, or confessions." *Melendez-Diaz*, 557 U.S. at 310 (quoting *Crawford v. United States*, 541 U.S. 36, 51-52 (2004)). Even Justice Thomas, who takes a narrow view of statements that are subject to the Confrontation Clause agrees "confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a 'striking resemblance,' to the examinations of the accused and accusers under the Marian statutes" – the very evil the Confrontation Clause was designed to remedy. *Davis v. Washington*, 547 U.S. 813, 836-37 (2006) (Thomas, J., concurring and dissenting in part). In *Crawford*, the Supreme Court traced the origins of the Confrontation Clause to the disreputable trial of Sir Walter Raleigh, which was criticized for ignoring the rule that "a suspect's confession could be admitted only against himself, and not against others he implicated." *Crawford*, 541 U.S at 45. Thus, any statement by Davis to anyone implicating Mr. Hamilton in some sort of scheme to pay her bribes, in whatever form are inadmissible.

II. JEREMY SCROGGINS SHOULD BE PRECLUDED FROM TESTIFYING ABOUT THINGS HE CLAIMS CAROLYN DAVIS TOLD HIM

A. Scroggins Lacks First Hand Knowledge Of Any Wrongdoing By Mr. Hamilton

If, as it appears, the government's case against Mr. Hamilton will seek to rely on Scroggins' naked assertion that he was "aware" that Mr. Hamilton's donations were bribes paid to Davis to influence her official actions, then such a tactic and offer of proof are not allowed. As explained below, Scroggins lacks any first-hand knowledge to support his statement. The Court should therefore exclude Scroggins' statement under Federal Rules of Evidence 602 and 802.

Federal Rule of Evidence 602 provides that a witness may "testify to a matter only if … [he] has personal knowledge of the matter." Rule 802 likewise prohibits a witness from testifying as to "the truth of the matter asserted in [a] statement" that "the declarant does not make while testifying at the current trial or hearing." *See* Fed. R. Evid. 801(c). Recognizing that the "personal

knowledge requirement and the hearsay rule are cut at least in part from the same cloth," the Fifth Circuit noted, "[i]t is axiomatic that a witness may not merely repeat the subject matter of a hearsay statement" or "rely on inadmissible hearsay as a substitute for his own knowledge." *United States v. El-Mezain*, 664 F.3d 467, 495 (5th Cir. 2011) (quotes and cite omitted). Indeed, the Rules Advisory Committee confirmed in its notes that Rule 602 serves to "prevent [a witness] from testifying to the subject matter of [a] hearsay statement [if] he has no personal knowledge of it."

The Fifth Circuit's opinions in *United States. v. $92,203.00 in U.S. Currency*, 537 F.3d 504 (5th Cir. 2008), and *El-Mezain* provide helpful guidance. In *$92,203.00*, the government filed a civil forfeiture action to claim money seized from a driver and his vehicle during a traffic stop by the Texas Department of Public Safety. *Id.* at 506. The government moved for summary judgment, relying only on a single affidavit prepared by an Immigration and Customs Enforcement agent who was not present at the traffic stop. *Id.* Despite the fact that he was not present at the traffic stop, the ICE agent stated in his affidavit that the driver had been pulled over by the Texas Department of Public Safety and that $92,203 had been recovered from the scene. *Id.* at 507. The driver opposed the summary judgment motion, arguing that the government's affidavit was inadmissible because the ICE agent lacked personal knowledge of the traffic stop. *Id.* at 506. The district court disregarded the driver's objection and entered judgment for the government. *Id.*

On appeal, the Fifth Circuit reversed. In siding with the driver, the Court observed that the agent's "affidavit was clearly not based on personal knowledge," as "it is undisputed that Agent Pena was not present when [the driver] was initially pulled over by Texas law enforcement." *Id.* at 508. Given this, the Court determined that "any information regarding those events could have been obtained only through hearsay." *Id.* The Court then concluded: "[T]he affidavit clearly contained hearsay, was not based on personal knowledge, and, under normal summary judgment

procedures, is not admissible."[1] *Id.*

El-Mezain illustrates a similar principle. There, the Court considered an appeal arising from several defendants' convictions of aiding the terrorist organization Hamas. 664 F.3d at 483. On appeal, the defendants argued that the trial court had erred by allowing a particular witness to testify, among other things, to Hamas' control of money in Gaza and the West Bank. *Id.* at 494. The defendants argued that the trial court should exclude this testimony because it was based exclusively on second-hand information rather than the witness's personal knowledge. *Id.*

The Fifth Circuit agreed with the defendants. *Id.* at 496. With respect to the witness's testimony that "Hamas controlled the zakat committees in Nablus, Jenin, Ramallah, and Hebron," the Court pointed out that the witness had admitted that his knowledge on the subject had come from "newspapers," "leaflets," the "internet," and "friends." *Id.* The witness's testimony, according to the Court, therefore "constitute[d] classic hearsay rather than personal knowledge." *Id.* It accordingly held that the trial court should have excluded the testimony. *Id.*

The Court here should reach the same outcome here as to any statements or testimony by Scroggins. He claims to be "aware" that "Mr. Hamilton's donations to Hip Hop Government were bribes to Davis to influence her official actions." Yet he also admitted that he never met or spoke with Mr. Hamilton, or saw Mr. Hamilton give any money to Davis. This begs an obvious question: If Scroggins had never encountered Mr. Hamilton, how could he have first-hand knowledge that Mr. Hamilton's contributions to Hip Hop Government were bribes made to Davis "*with intent* to influence or reward" her for official actions? *See* 18 U.S.C. §666(a)(2).

In crafting a story to obtain his sweetheart plea agreement, Scroggins could only have

[1] The standard for admissibility on summary judgment is whether the evidence would be admissible at trial. *See* Fed. R. Civ. P. 56(c)(2).

claimed to have learned about the supposed bribery scheme and Mr. Hamilton's intent second-hand from Davis. Without insight from Davis, Scroggins would know, at most, (1) that Mr. Hamilton donated money to Hip Hop Government and (2) that he (Scroggins) stole money from Hip Hop Government and gave it to Davis, at Davis' request. Scroggins could not know on his own that Mr. Hamilton knew that either he or Davis was embezzling from Hip Hop Government by taking money for personal gain. Nor could he know that Mr. Hamilton's reason for participating in the scheme was to influence Davis.

In the same way that the ICE agent in *$92,203.00* was not present for the traffic stop and the witness in *El-Mazain* did not have first-hand knowledge of Hamas's use of funds in the West Bank, any information that Scroggins learned concerning Mr. Hamilton's knowledge or intent "could have been obtained only through hearsay." *$92,203*.00, 537 F.3d at 508. And under Rules 602 and 802, Scroggins cannot "testify[] about a hearsay statement upon which he has no personal knowledge." *El-Mezain*, 664 F.3d at 495. The Court should therefore exclude Scroggins' testimony as to the purported bribery scheme.

B. The *Bruton* Problem Cannot Be Solved Through Any Hearsay Exception

Bruton issues pose fundamental fairness issues that go beyond the ordinary problems associated with the admission of out-of-court statements. Accordingly, the Supreme Court has made clear: "Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). The Supreme Court has gone so far as to say that "the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Id.* Thus, the peculiar nature of the *Bruton* problem necessitates more rigorous evidentiary solutions – "the fact

that a confession that incriminates an accomplice is so 'inevitably suspect' and 'devastating' that the ordinarily sound assumption that a jury will be able to follow faithfully its instructions could not be applied." *Id.* (quoting *Bruton*, 391 U.S. at 136).

The hearsay exception for statements against penal interest cannot be used to defeat a *Bruton* issue, as that would effectively gut *Bruton* altogether. In *Bruton* itself, and every case raising a *Bruton* error, one defendant has confessed to both their involvement in a crime and the involvement of another defendant. If the fact that the declarant's confession as to themselves was good enough to justify introducing statement as against their own interest, *Bruton* would have come out the other way. *Bruton*, 391 U.S. at 124. The same is true of the co-conspirator hearsay exception. *See, e.g.*, *Brown v. United States*, 411 U.S. 223, 230 (1973) (explaining the government confessed a *Bruton* error in admitting a confession by one co-conspirator against another in a case changing conspiracy); *see also Greene v. Fisher*, 565 U.S. at 42 (addressing *Bruton* error in admitting co-conspirator confession where the other defendant's name was redacted in deciding whether that error was clear pre-*Gray v. Maryland*, 523 U.S. 185 (1998)). *Bruton* itself involved a confession by an alleged "accomplice." *Bruton*, 391 U.S. at 124.

C. No Hearsay Exception Appears Available

Any out-of-court statement by Davis incriminating Mr. Hamilton would be hearsay, not subject to any exception. The defense is left shadow-boxing here as it is unclear what evidence the government will seek to prove its claims. If necessary, the defense will file supplemental motions once the government identifies the statements it would seek to introduce as evidence.

1. Statement Against Interests

Federal Rule of Evidence 804(b)(3) permits a statement by an unavailable witness to be admitted if it was a statement against the declarant's interests and it is supported by "corroborating

circumstances that clearly indicate its trustworthiness." Any statement by Davis implicating Mr. Hamilton would fail both prongs of this test.

The Supreme Court has made clear that a declarant's statement against interest does not include making statements that inculpate others. In *Williamson*, the Supreme Court explained:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court cannot just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement inculpates someone else.

Williamson v. United States, 512 U.S. 594, 601-02 (1994). Even, "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-incriminatory parts." *Id.* at 599.

Nor would any statement by Davis inculpating Mr. Hamilton be supported by "corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B). Again, the Supreme Court has gone so far as to say that "the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee*, 476 U.S. at 541; *see id.* at 546 (refusing the "depart from the time-honored teachings that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violates the constitutional right to confrontation."). Particularly "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* For example, Davis could have made inculpatory statements of Mr. Hamilton to Scroggins to lessen Scroggins fear that Mr. Hamilton could discover their theft and report the crime, or to justify why Scroggins should give her money from checks made out to his organization, or Davis could have made incriminatory statements to law enforcement to obtain a favorable charging decision or sentence. *Williamson*, 512 U.S. at 604.

The particular circumstances of this case would certainly not "clearly indicate" the trustworthiness of any statement by Davis inculpating Mr. Hamilton. As addressed in detail elsewhere, four witnesses have come forward to explain that shortly before Davis' death, Davis told them that she had been intimidated into pleading guilty, she intended to change her plea to not guilty, and, if called to testify, would testify that Mr. Hamilton had not bribed her or done anything wrong. (STA Mot. To Dismiss, Exs. A-C.) That testimony is powerful evidence that any statement by Davis to the contrary is not reliable.

2. Co-Conspirator Hearsay Exception

It would be no answer for the government to argue that Scroggins learned of the alleged bribery scheme through a non-hearsay co-conspirator statement. *See* Fed. R. Evid. 801(d)(2)(E). To introduce a co-conspirator statement, the government "must show by a preponderance of the evidence that (1) a conspiracy existed, (2) the statement was made by a co-conspirator of the opposing party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy." *United States v. Gurrola*, 898 F.3d 524, 535 (5th Cir. 2018).

Notably, "the out-of-court statement alone is not sufficient to support its own admission." *United States v. Richards*, 204 F.3d 177, 202 (5th Cir. 2000), *overruled on other grounds United States v. Cotton*, 535 U.S. 625 (2002). Indeed, because such "out-of-court statements are presumptively unreliable, … all circuits addressing the issue have explicitly held absent some independent, corroborating evidence of defendant's knowledge of and participation in the conspiracy, the out-of-court statements remain inadmissible." *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994)." And "the amount of independent evidence required is not merely a scintilla, but rather, enough to rebut the presumed unreliability of the hearsay." *United States v.*

Warman, 578 F.3d 320, 337 (6th Cir. 2009) (quotations and citation omitted).

For starters, the government has not uncovered even a single iota of evidence supporting the existence of a conspiracy beyond Scroggins' self-serving statement. The government can only show that Mr. Hamilton and Davis knew each other, that Mr. Hamilton contributed to Hip Hop Government, and that Scroggins stole money from that charity, ostensibly to give it to Davis. There is no indication that Mr. Hamilton knew that Scroggins or Davis were embezzling from Hip Hop Government, or that Mr. Hamilton understood that he was participating in a *quid pro quo* arrangement with Davis. Again, there was no contact between Mr. Hamilton and Scroggins at all. With such threadbare facts, the government cannot "rebut the presumed unreliability of the hearsay." *Warman*, 578 F3d at 337.

Even assuming the government could satisfy its burden as to the first three elements (and it cannot), the government cannot show that the "statement was made in furtherance of the conspiracy." Courts consider a statement to be "in furtherance of the conspiracy" where it "advance[s] the ultimate objects of the conspiracy." *Id.* at 535-36. By contrast, "mere idle chatter or … narratives of past conduct are not in furtherance of the conspiracy" will not suffice, as they "were not intended to further the conspiracy." *United States v. Ebron*, 683 F.3d 105, 136 (5th Cir. 2012); *see also United States v. Gupta*, 747 F.3d 111, 123 (2d Cir. 2014) ("To be in furtherance of the conspiracy, a statement must be more than 'a merely narrative' description by one co-conspirator of the acts of another.").

Here, there is no reason to believe that any statement from Davis to Scroggins about Mr. Hamilton's knowledge of the alleged bribery scheme would have furthered the conspiracy. Scroggins claims Davis gave him Mr. Hamilton's personal checks, that he deposited the checks in a Hip Hop Government account, and he withdrew the funds for Davis, at her direction. Any

additional information as to *why* Mr. Hamilton was writing checks and *why* Davis was withdrawing the proceeds would have been superfluous. Scroggins was not part of any alleged bribery. According to Scroggins, he was simply giving money to Davis. There is no reason to believe that Davis expected to "advance the ultimate objects of the [alleged bribery] conspiracy" by filling Scroggins in on the purpose for depositing the checks and withdrawing the funds. Assuming Davis told Scroggins that the donated money was part of a bribery scheme, that discussion was nothing more than "idle chatter" or a mere narrative description by Davis.

Moreover, it is not uncommon for criminals to lie, exaggerate or brag about their criminal exploits in order to persuade someone to join their conspiracy. *See, e.g.*, *United States v. Watchmaker*, 701 F.3d 1459, 1472 (11th Cir. 1985). Criminals often entice their victims to pay bribes by telling them that everyone pays. Criminals encourage others to join their conspiracies by exaggerating their power or influence.

Here, Davis is handing Scroggins checks from Mr. Hamilton made out to Scroggins' charity, which Scroggins could leave entirely with the charity or cash and keep entirely to himself. Scroggins had no reason to give any of that money to Davis – the checks were made out to his charity and Scroggins would face severe criminal penalties if he was caught embezzling money from his charity. Davis could have lied to Scroggins by claiming the checks were not really for charity, but were bribes, so that Scroggins would share the money with her on an ongoing basis. The claim of such a bribery conspiracy would both provide a justification for giving money to Davis as, in this sense she earned it, and give Scroggins comfort that Mr. Hamilton would not go to the police if he learned that his money was being stolen from the charity. While such a lie may have been an effective way for Davis to entice Scroggins to join her in a conspiracy to embezzle from a charity, such a lie would not make her statement true, or establish that Mr. Hamilton was

part of a bribery conspiracy that never really existed.[2]

CONCLUSION

Any statement by Carolyn Davis inculpating Mr. Hamilton, including statements made by Jeremy Scroggins based on alleged hearsay statements he will claim to have been told by Davis, are inadmissible hearsay that are barred by the Confrontation Clause, and they should be excluded by this Court. Without this evidence, the government has not case, and the Indictment should be dismissed.

Dated: September 26, 2019

Respectfully submitted,

/s/ Abbe David Lowell
Abbe David Lowell, Bar No. 358651DC
Christopher D. Man, Bar No. 453553DC
Kaitlin A. Pierce, Bar No. 242020DC
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
ADLowell@winston.com
202-282-5000 (ph)
202-282-5100 (fax)

Dion J. Robbins, Bar No. 488888GA
WINSTON & STRAWN LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201
DRobbins@winston.com
214-453-6100 (ph)
214-453-6400 (fax)

Counsel for Defendant Ruel M. Hamilton

[2] A more tenuous link to an alleged conspiracy is hard to imagine. At the very least, the government should make its offer of proof at a *James* hearing to determine whether it can prove a conspiracy before admitting co-conspirator statements pursuant to that alleged conspiracy. *United States v. James*, 590 F.2d 575 (5th Cir.1979). "*James* advised that '[t]he district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator.'" *United States v. Fragoso*, 978 F.2d 896, 900 (5th Cir. 1992) (quoting *James*, 590 F.2d at 582). "[J]udicial economy suggests that express findings on admissibility should be made before the coconspirator statements are introduced." *Id.*; *see Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy."); *see United States v. Potashnik*, 2008 WL 5272807, at *26 (N.D. Tex. Dec. 17, 2008) (Lynn, J.) (indicating Court would hold a *James* hearing if the Court sought to admit disputed statements).

CERTIFICATE OF SERVICE

I certify that on September 26, 2019, a copy of the foregoing was filed with the Court's electronic case filing system, thereby effecting service on counsel for all parties.

/S/Abbe David Lowell
Abbe David Lowell